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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 986.

HIGHLAND DAIRY, INC., REISS DAIRY, INC., and SUNNY HILL FARMS DAIRY COMPANY, INC., et als.,
Petitioners,

v.

THE KROGER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' SUPPLEMENTAL BRIEF.

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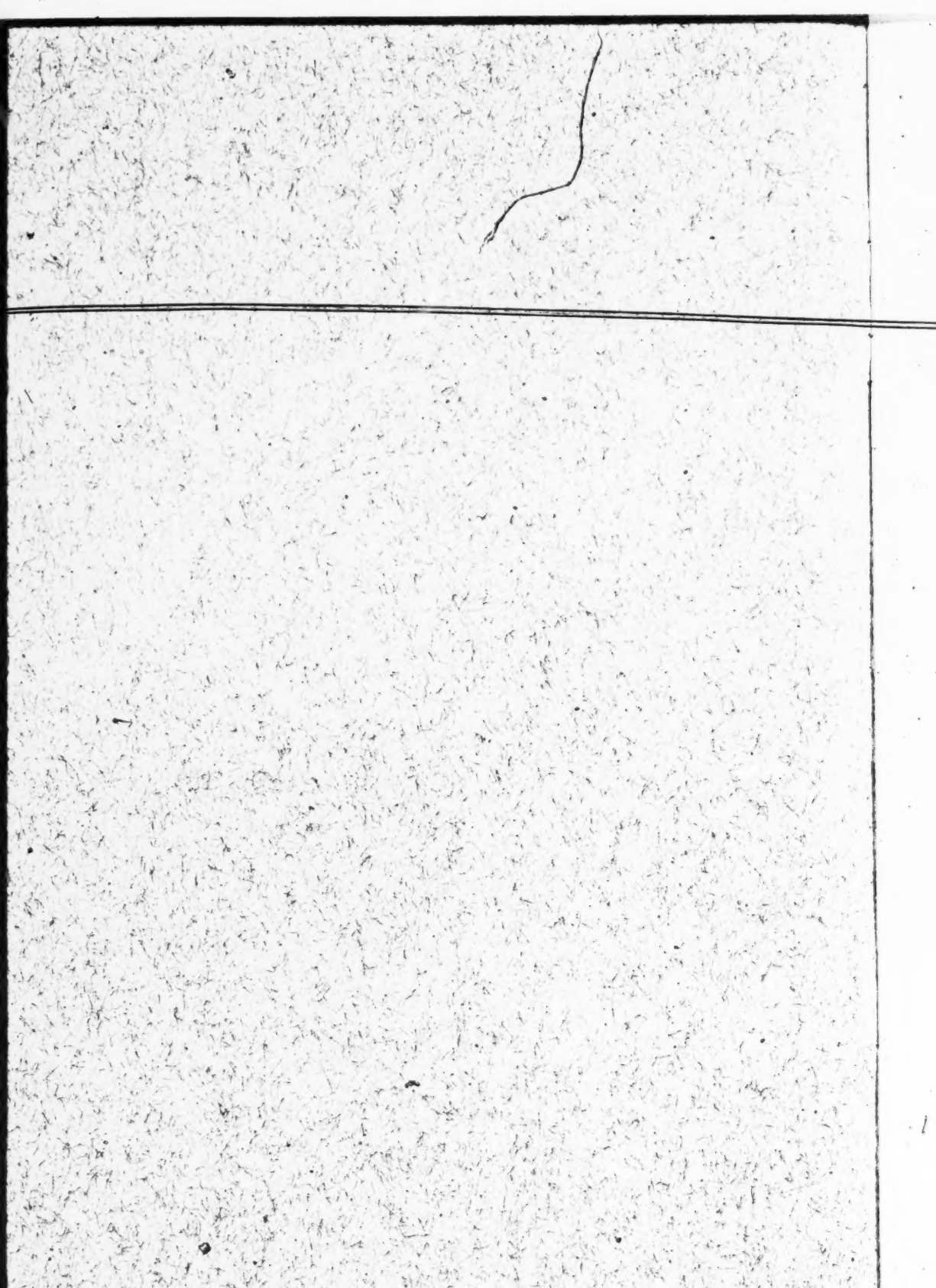
ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.



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PETITIONERS' SUPPLEMENTAL BRIEF.

Petitioners file this supplemental brief pursuant to Supreme Court Rule 24 (5), in order to call attention to a new case and to new matter not available at the time of last filing.

THE NEW CASE.

On April 7, 1969, this Court decided Fortner Enterprises, Inc. v. United States Steel Corp., ... U. S. ..., 89 S. Ct. 1252. Fortner sought treble damages from United States Steel for violation of Sections 1 and 2 of the Sherman Act for tying the sale of prefabricated houses

to loans made by United States Steel Homes Credit Corp. to Fortner.

In the Fortner opinion this Court reiterated the importance of private antitrust litigation "not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition," and strongly reaffirmed the rule of Poller v. Columbia Broadcasting, 368 U. S. 464 (1962) that summary proceedings in antitrust cases are disfavored. .... U. S. ..., 89 S. Ct. 1252, 1257-1259. One of petitioner's grounds for requesting the writ is that the court below failed to follow the Poller case. Petition pp. 14-15.

Most important of all, in Fortner this Court clearly holds that an allegation of dominant percentage type monopoly power is not necessary to state a claim under Sections 1 and 2 of the Sherman Act. This was Petitioner's principal argument. Petition, pp. 9-15. The Court below held that in the absence of an allegation of dominant percentage type monopoly power a claim can not be stated under Section 2 of the Sherman Act and dismissal is proper. Petition, pp. A-16–A-22. Fortner makes the error of this position clear beyond any shadow of doubt.

THE NEW MATERIAL.

In January 1969, when the petition was filed Kroger had established for Kroger milk a differential in the retail price for a half gallon of homogenized milk of 7¢ under Sealtest, a national independent dairy, and 10¢ under Valley Farm, a local independent dairy. Petition, p. A-49. This, in an industry where profits average less than 2 per cent of sales. Petition, p. 18.

The trial court refused to believe that Kroger had the market power to force brand-name milk off its shelves because of the hold that brand-name advertising has over

consumers. Petition, p. A-5. Respondent, in his brief in this Court, said that Petitioner's affidavit showing the above differentials in favor of Kroger milk proved the trial court correct and showed the "emptiness of the charge" that Kroger could monopolize even as to its own outlets. Rep. Br., p. 13. The affidavit in the Appendix shows that Kroger, in the interim, *has* monopolized the retail shelves in its stores for its own milk, keeping token amounts of only two other brands. In one Kroger store, Kroger has its own milk in 73 lines of cartons out of 84, leaving only 7 lines for Sealtest and 4 lines for Valley Farm. In another Kroger store Kroger has its own milk in 51 out of 60 lines of cartons; leaving 8 for Sealtest and 1 for Valley Farm.

Clearly Kroger is already exercising the destructive power that so gravely imperils independent dairies in the St. Louis area, national or local. Sealtest (National Dairy Products), and Valley Farm Dairy are named in the class for which Petitioner's brought the instant action.

New material also shows that Kroger's actions are forcing dairies selling to chain stores competing with Kroger to make price concessions that will prove ruinous. As the affidavit in the Appendix shows two local independent dairies, Pevely and Adams, are now selling their milk under private label to Bettendorf and National Food Stores respectively at prices that permit these stores, on a half gallon of homogenized, to sell their private label milk furnished by Pevely and Adams, at 9¢ less than the same milk on the same shelves under Pevely's and Adam's own brand names. Again, this is an industry where profits average less than 2 per cent of sales. Pevely and Adams are named in the class for which Petitioners brought this action.

Kroger has enough power to destroy all independent dairies in the St. Louis area, national and local, and is

using it for that purpose. Petitioners alleged that Kroger would acquire power of the nature and to the extent that the Affidavit in the Appendix to this Supplemental Brief shows it has in fact acquired. Petition, pp. 4-5; R. pp. 5-7. If that is not enough power to state a claim under the antitrust laws under the only section which can possibly afford these independent dairies protection against death by economic muscle, then the protection of the antitrust laws for independent businesses is puerile.

CONCLUSION.

The failure of the court below to follow the antitrust law as interpreted by this Court is now unequivocally clear, and the imminent danger to the independent dairies has greatly increased since the Petition for Certiorari was filed in January. The petition for a writ of certiorari should be granted and the decision below reversed per curiam so that trial on the merits can proceed immediately.

Respectfully submitted,

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APPENDIX

CONCLUSION

APPENDIX

APPENDIX.

Gray L. Dorsey
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AFFIDAVIT.

State of Missouri, } ss.
County of St. Louis. }

I, Gray L. Dorsey, attorney at law, swear that on May 6, 1969, between the hours of 10:00 a. m. and 11:30 a. m., I personally observed the following facts in the Kroger Stores at Olive Blvd. and Midland Blvd., and in Westroads Shopping Center; in the Bettendorf Stores at Hanley and Clayton roads, and at 8041 Olive Blvd.; and in the National Food Stores at Olive Blvd. and Midland Blvd., and Big Bend and Ethel street, all in the St. Louis area:

(1) At the Olive-Midland Kroger Store there were 60 lines of cartons of milk in the dairy case (counting half gallon cartons 1 line, quarts ½ a line, and gallons 2 lines). Sealtest, a national independent dairy, had 8 lines; Valley Farm, a local independent dairy, had 1 line; Kroger milk, from its own processing plant, occupied 51 lines. For half gallons of homogenized milk prices were: Kroger, 48¢; Sealtest, 55¢; Valley Farm, 58¢.

At the Westroads Kroger Store there were 84 lines of cartons of milk. Sealtest had 7 lines; Valley Farm 4 lines; and Kroger milk occupied 73 lines. For half gallons of homogenized milk prices were: Kroger, 48¢; Sealtest, 55¢; Valley Farm, 58¢.

(2) At both Bettendorf Stores half gallons of homogenized milk of Pevely, a local independent dairy, were offered at 57¢. Side by side, half gallons of homogenized milk under the Bettendorf label were offered at 48¢. The code number printed at the top of the cartons of Bettendorf milk showed that it was processed by Pevely Dairy.

(3) At both National Food Stores half gallons of homogenized milk of Adams, a local independant dairy, were offered at 57¢. Side by side, half gallons of homogenized milk under the Top Taste label of National were offered at 48¢. The code number printed at the top of the cartons of Top Taste label milk showed that it was processed by Adams Dairy.

/s/ Gray L. Dorsey,
Gray L. Dorsey.

Subscribed and sworn to before me, this 6th day of May, 1969.

Erna Arndt,
Notary Public.

My commission expires the 1st day of September, 1972.

(Seal)